

USDOL/OALJ Reporter

[\*Hill v. Tennessee Valley Authority\*](#), 87-ERA-23 and 24 (ALJ Dec. 1, 1987)

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**U.S. Department of Labor**  
Office of Administrative Law Judges  
1111 20th Street, N.W.  
Washington, D.C. 20036

87-ERA-23

87-ERA-24

In the Matter of

CHARLES HILL, et al.,  
Complainants,

v.

TENNESSEE VALLEY AUTHORITY,  
Respondent

In the Matter of

EDNA OTTNEY,  
Complainant

v.

TENNESSEE VALLEY AUTHORITY,  
Respondent

**RECOMMENDED ORDER**

This proceeding arises under Section 210 of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. Section 5851 (hereinafter referred to as the "ERA"), and the implementing regulations promulgated thereunder at 29 C.F.R. Part 24. Complainants, twenty-four former employees of the Quality Technology Company ("QTC"), initiated these proceedings on November 24, 1987 by filing their complaint with the Wage and Hour Division, Employment Standards Administration, of the United States Department of Labor. In their complaint, Complainants contend that QTC was contracted by the Tennessee Valley Authority ("TVA") to develop and implement an employee concern program at TVA. Complainants allege that TVA violated the ERA when it drastically

narrowed the scope of the contract and eventually refused to renegotiate its contract with QTC in retaliation for QTC's investigation, corroboration and requested public disclosure of numerous safety-related problems disclosed by TVA employees to QTC. In

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their prayer for relief, Complainants request reinstatement, back pay with interest, damages and attorneys' fees.

In accordance with 29 C.F.R. Part 24 the Wage and Hour Division conducted an investigation into the complaint and concluded that although TVA is an employer subject to the provisions of the ERA, Complainants were not employees of TVA, but rather of QTC. The Wage and Hour Division determined, therefore, that Complainants were not covered by the whistleblower protection provisions of the ERA. Complainants appealed the Wage and Hour Division's determination to this office.

On appeal, Complainants contend that under either an agency right-to-control theory or a joint employer theory, they should be considered employees of TVA within the purview of the ERA. TVA argues that QTC was the employer of Complainants and that TVA, therefore, is not liable under the ERA. TVA argues that this matter should be dismissed for want of jurisdiction.

The following findings of fact and conclusions of law are based upon a careful analysis and review of the entire record, including the briefs and arguments of the parties, the appropriate regulations, statutory authority and case law. The parties' Statement of Agreed Facts, which was filed with this office on July 27, 1987, is hereby accepted and incorporated herein by reference.

The pertinent provisions of Section 5851 generally prohibit an employer from discharging or discriminating against any employee due to the employee's participation in protected activities. 42 U.S.C. Section 5851(a)(1), (2) and (3). The initial issue to be resolved in the instant matter is whether TVA is an employer of Complainants within the purview of the ERA and appropriate regulations. For the following reasons I find that it is not.

Complainants contend that Section 5851(b)(1) of the ERA vests jurisdiction in the Secretary of Labor over the Complaint of "[a]ny employee who believes that he has been discharged or otherwise discriminated against by any person" in violation of the Act, as long as the complaint was timely filed. Complainants argue that as employees of QTC they are necessarily entitled to the protection due covered employees under the whistleblower provisions of the ERA. They argue that this office, therefore,

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has jurisdiction over their complaint.

Section 5851(b) must be read in conjunction with Section 5851 (a), however. Such section states in pertinent part that "[n]o employer . . . may discharge any employee [due to protected activity]." When read together the two sections clearly require that an employer-employee relationship exist between the parties before the prohibition against discrimination by an employer against an employee can be enforced under the ERA. To hold otherwise would clearly ignore the undeniable meaning and inherent limitations of the statutory language. While Complainants correctly argue that Section 210 of the ERA is remedial legislation which in light of its purpose must be liberally construed, it cannot be ignored that finding an employer-employee relationship between complainant and respondent is a prerequisite to granting relief under the Act.

None of the employee protection provisions of the diverse acts to which 29 C.F.R. Part 24 applies provide a definition of "employer." See Safe Drinking Water Act, 42 U.S.C. 300j-9(i); Water Pollution Control Act, 33 U.S.C. 1367; Toxic Substances Control Act, 15 U.S.C. 2622; Solid Waste Disposal Act, 42 U.S.C. 6971; Clean Air Act, 42 U.S.C. 7622. Nor is "employer" defined in the language of the ERA, 42 U.S.C. 5851. Although the ERA does not define either "employer" or "employee," the courts, when determining whether an employer-employee relationship exists, on numerous occasion have analogized cases arising under the ERA employee protection provisions to those arising under similar provisions of the National Labor Relations Act. 29 U.S.C. § 158(a)(4)(1982). The ERA's legislative history indicates that the whistleblower provisions of Section 210 were patterned after similar provisions in the Clean Air Act, 42 U.S.C. § 7622; and the Federal Water Pollution Control Act, 33 U.S.C. S 1367, which were patterned after the National Labor Management Act, 29 U.S.C. § 141 and similar provisions in Public Law 91-73 relating to the Federal Coal Mine Health and Safety Act. See 1978 U. S. Code Cong. and Adm. News, p. 7303. Cases decided under the NLRA constitute a substantial body of law which should be examined when determining who is an employee or employer within the meaning of the ERA. See *Consolidated Edison Co. v. Donovan*, 673 F.2d 61, 62 (2d Cir. 1982).

Both TVA and Complainants agree that the "right-to-control" test, derived from common law agency principles and developed under the NLRA, is the appropriate test to apply to determine

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whether an individual is an "employee" within the meaning of the ERA, or an independent contractor, and therefore exempt from the employee protection provisions of the ERA. *NLRB v. Tri-State Transport Corp.*, 649 F.2d 993, 995 (4th Cir. 1981). Section 152(3) of the NLRA, 29 U.S.C. § 152(3) (1982), specifically exempts independent contractors from the definition of "employee." See *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968). This exemption has been extended to the employee protection provisions of the ERA.

In applying the right-to-control test to determine whether an individual is an "employee" within the purview of the ERA, all of the "incidents of the relationship must be assessed and weighed" and the "total factual context" examined in light of common law agency principles, with no single factor being determinative. *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968). The right-to-control test was applied in *Faulkner v. Olin Corporation*, 85-SWD-3, *recommended dec.* (Aug. 16, 1985), *adopted by the Sec. of Labor* (Nov. 18, 1985), to distinguish an employee from an independent contractor for purposes of the Solid Waste Disposal Act, 42 U.S.C. § 6471 (1982). In finding that an employer-employee relationship existed between the parties, it was found that the employer controlled not only the result to be achieved by employee's labors, but the means used in attaining the results. *Id.* at 14. In *Checker Cab Co. and its Members*, 141 NLRB 583 (1963), it was held that control over the manner, means and details of the work is indicative of employee status. *Id.* at 587.

In the instant matter, the Nuclear Regulatory Commission (NRC) raised safety concerns regarding the Watts Bar Nuclear Plant. In response to the NRC's safety concerns, TVA entered into a one-year contract with QTC, a partnership which provides consulting and investigative services throughout the nuclear power industry, to develop and implement a program for the identification, investigation and reporting of TVA employees' concerns. QTC conducted confidential interviews of TVA employees and then forwarded the concerns to TVA's Nuclear Safety Review Staff after deleting information which could identify concerned employees.

Complainants argue that TVA retained and exercised the right to significantly control and direct Complainants in their work, not only as to the result to be accomplished but as to the details and means by which they accomplished that result as well.

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In support of their assertion, Complainants contend that TVA controlled Complainants' activities both generally and in their specific daily activities. They argue, *inter alia*, that TVA's Nuclear Safety Review Staff developed procedures to direct even the most minute details of QTC's work. Complainants argue that QTC employees were "indoctrinated" with TVA's procedures prior to commencing their employment at TVA and were required to follow TVA procedures for all of the work they performed for TVA. They further argue that TVA controlled the scheduling and length of employee interviews and chose the employees to be interviewed each day. According to Complainants, QTC was required to follow TVA guidelines to prioritize and categorize employees' concerns and TVA procedures controlled the information which QTC reported to TVA. Further, Complainants argue that TVA set the salaries for each category of QTC employee, reviewed QTC employees' timesheets and retained the right to approve the employment of QTC employees. Complainants also assert that TVA controlled QTC employees' access to the work place.

Complainants argue that all of the foregoing indicates that TVA controlled not only the end result to be achieved by QTC's investigations and the corrective actions to be taken in response to such investigations, but also controlled the manner and means by which QTC employees accomplished their work.

Upon careful examination of the entire record, including the contract entered into by QTC and TVA and the parties' Agreed Statement of Facts, I find that the record does not support Complainants' assertion that TVA controlled their activities as to the time, manner and method of performing their work. Although TVA specified in its contract with QTC various provisions of the employee concerns program essential to assist TVA in securing a license for the Watts Bar Nuclear Plant, the contract entered into between QTC and TVA demonstrates that QTC, and not TVA, controlled Complainants, specific employment activities.

The record indicates that pursuant to the contract, QTC developed and instituted the Employee Response Team (ERT) program which detailed procedures by which QTC employees would interview TVA employees and investigate and report on their concerns. I find that Complainants conducted the interviews and investigations in accordance with the contract entered into between QTC and TVA, and not as directed by TVA. I find that QTC controlled Complainants' rates of pay, fringe benefits and general conditions of employment,

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including their day-to-day activities. The contract entered into between QTC and TVA, and not TVA acting independently of such contract, established the guidelines for conducting the ERT program. and for achieving the desired results, which included the gathering and investigation of employees' concerns. TVA was interested in seeing that these results were achieved, but TVA did not control the day-to-day activities required to achieve them. The control TVA did exercise independent of the contract was mandated by safety concerns or NRC requirements which were directed at all persons working at the nuclear site. Searching persons entering or leaving the site, restricting access to the site and requiring persons to undergo a training program before working at the site indicates TVA's adherence to basic operating procedures and safety measures. Such limited control exercised by TVA is insufficient to support a conclusion that Complainants were employees of TVA. QTC, not TVA, exercised control over Complainants as to the time, manner and method of performing the work assigned by QTC pursuant to its contract with TVA. In view of the foregoing, I am constrained to conclude that TVA did not possess or exercise control over Complainants' activities and that a right-to-control analysis fails to support the assertion that TVA was the employer of Complainants.

In cases involving a determination of employee status for enforcement of anti-discrimination statutes, employers have been found to be joint employers under certain circumstances. *General Electric Corporation*, 256 NLRB 753 (1981). The record does

not support such a finding in the instant case, however, and I cannot conclude from the evidence adduced that TVA and QTC were joint employers of Complainants.

The relationship between TVA and QTC does not satisfy the criteria set forth in *Radio & Tel. Broadcast Technicians v. Broadcast Serv.*, 380 U.S. 255 (1965), for finding a joint employer relationship. Such criteria include interrelation of operations, common management, centralized control of labor relations and common ownership between the entities concerned. *Id.* at 256. QTC's management, operations, ownership and labor relations are totally distinct from TVA's and not a single factor set forth in *Radio & Tel. Broadcast* is satisfied in the instant case. Nor is the legal standard set forth in *Carrier Corporation v. NLRB*, 768 F.2d 778 (6th Cir. 1985) (*quoting NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117, 1124 (3d Cir. 1982)) satisfied. in the instant case, TVA and QTC did not

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both exert significant control over Complainants, nor has it been shown that they shared or co-determined those matters governing essential terms and conditions of Complainants' employment. *Id.* at 781.

Based upon the foregoing, I find and conclude that Complainants were not employees of TVA, but were employed by QTC. Complainants, therefore, are not covered employees for purposes of Section 210 of the ERA and this office does not have jurisdiction in the above-captioned matter.

#### RECOMMENDED ORDER

For the reasons herein set forth, it is hereby RECOMMENDED that the Complaint against TVA be DISMISSED.

JOHN M. VITTON  
Associate Chief Judge

Dated: 1 DEC 1987  
Washington, D.C.  
JMV/RAM/tt